THE BASES OF DIVORCE.

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Today, when questions concerning divorce are bruited about by all sorts and conditions of men and by women as well, who seem to feel that their interest is much the greater, we should consider the question from the standpoint of fundamental principles. A thorough knowledge of a problem is the fundamental basis for all reformative work. Let us see what is the object sought. In our country, the great outcry apparently is for uniform divorce laws.[1] But it may be doubted if uniformity *per se* is the aim of more than an infinitesimal percentage of those who enlist in this reform. They want uniform divorce laws, so that the laws of such or such a state may be changed —they would grasp

"the sorry scheme of thing entire
And mould it nearer to their heart's desire."

This statement may seem unjust to those members of the bar and the laity, whose only object is to destroy the conflict of laws on this subject, because so much anguish, chagrin, and shame are caused by the decisions of those of our states that refuse to recognize divorce secured in another. But, as we have suggested, a large number of the champions of this movement are sailing under false colors to the extent that uniformity *per se* would not satisfy them. Thus, the question, involved in this propaganda, is largely the old question of the ethical justice of divorce, which has divided Europe into two camps at least since the days of Imperial Rome.

Changes tending to restrict divorce are advocated. And it is particularly because of this advocacy that we think a thorough examination of the bases of marriage should be made in order to adjust the law to meet the psychological, sociological, and ethical (to say nothing of the economic) needs of the present age. We speak with precision when we say such a study is an especial pre-requisite of change.

"There is nothing so good, however, that it cannot be made better, and it is proper from time to time to take a survey of the law, or at least of some of

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[1]We have used the term "divorce" throughout this article to denote an absolute legal dissolution of the marriage relation, subject, however, to conditions imposed by the court, such as the prohibition of marriage with the corespondent or within a certain time.

its departments, in order to determine what changes should be made for its improvement. At the outset, however, it should be admitted that the burden of proof rests upon the advocate of change. *Quieta non movere* is a safe maxim. Mere alteration of the old order is an error unless the new is obviously better. Mere motion, change of position, is not necessarily progress.

"A man whose horse runs away with him is assuredly progressing, but progressing to a smash-up rather than to safety. Better stand still for awhile, make up your mind where you had best go, and then move quietly on with your steed under control. I yield to no man in my reverence for antiquity. But just as a thing is not necessarily better because it is new, so it may not be the best because it is old."[2]

The precipitate and unconsidered tendency to change the law is one of the worst features of the American legislation of today. As Judge Gest continued:

"There is also great danger in changes suggested which are based on *a priori* theory. This was Bentham's grand error. With next to no practical experience he never hesitated to advocate fundamental changes in the law without any clear vision of their practical sufficiency for the purpose intended. He would sit down with a light heart to advise the Portuguese nation upon the revision of their constitution (Bowring Ed., VIII-482), or the Spanish Cortez as to their proposed Penal Code (VIII-487), or to draft a code for the judicial system of France (IV-287), or to formulate securities against misrule adapted to a Mohammedan State for the assistance of the Pasha of Tripoli (VIII-555), or to favor President Madison with a few thoughts on codification (IV-452), or to sketch the leading principles of a constitutional code for any state (II-267) as if you could organize a government with a set of printed blanks."[3]

Thus it is that many advocates of reformation of the divorce laws act. They take no thought of conditions or circumstances affecting the underlying causes which give rise to the desire for divorce. They do not see that law should fit conditions and not be a superimposed structure. They would alter law without regard to the circumstances which it is to govern. They have no idea of the continuous fluctuation of conditions.

"The alteration of the law is analogous to the movements of the rudder of a ship sailing among the waves and tides and cross currents of social needs. If the sea were still and the winds unwavering the sailors might set a straight course and lash the rudder in a fixed position, but this is not our case. We do not and cannot voyage in a straight line, and on clear days we must make a fresh observation and set our course anew."[4]

This plan is either to carve an *a priori* theory or to adopt the law of some foreign place or of another age.

Neither plan involves a study of local or temporal conditions. To quote Judge Gest again:

"A kindred caution should be observed in copying legislation from other jurisdictions. It does not follow that because a law or system of laws works well in some places, that it is suitable to others, and there is need of even greater caution when the legislation is novel in character and a sufficient time has not elapsed in which to estimate fairly its advantages and defects. Let other

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[2]"Suggestion for the Amendment of the Laws of Descendents Estates in Pennsylvania, an address by Hon. John Marshall Gest, of the Orphans Court of Philadelphia, before the Law Assn. of Philadelphia, Philadelphia, 1912, p. 1."

[3]Ibid. p. 3.

[4]Ibid. p. 2.

nations or states make their costly experiments while we watch and wait. *Fiat experimentum in corpore vili.*"[5]

Let us now state our problem briefly. It is to study all the conditions and circumstances of every kind and character which enter into or affect the status of matrimony, in order to determine the regulations and provisions, which will make for the full development of the contractors, individually and as a family. In the case of the family relation, of course, the children are to be considered, since upon them will depend the well-being and development of the society of which they form a part. The last phase may be tautological, inasmuch as the full development of the individual and of the family is possible only in a fully developed state. These conditions we will take up in this article only in the abstract, in an endeavor to show not the conditions at any certain time and place, but the subjects to be studied for the determination of divorce legislation, and the results of the ignorance or disregard of such conditions. To reach our end, we must look into the psychological, ethical, and social bases of matrimony. We will, if possible, deduce from these the ideal, towards which humanity tends, and will discover the aid that its attainment secures through laws that are psychologically, ethically, and socially adapted to the ideal.

In the family, which is the subject of marriage laws, there are two relations, the conjugal and the parental. And while we here consider the former directly, the latter is involved also. The psychological foundation of matrimony is love. This sentence is not the practical effusion that it may seem. It has been developed by one of the greatest Italian jurists and philosophers of the last century.

"Love the cause of matrimony, is not the winged child of the myth, otherwise the conjugal union would be fleeting; neither is it the impulse to the production of the beautiful in a beautiful mind and body, as Plato believed, because this would deprive it of the natural tendency to generation, and furthermore in this case, it could exist between individuals of the same sex. Love is rather the inclination of the senses, an affection, a desire untrammelled by reason. This fleeting appetite is raised to an enduring sentiment, to a constant will becoming a duty, and existing in fidelity and mutual sacrifice. Here, as elsewhere, it is the mind which makes the elements of the senses necessary and keeps them true. Plato did not thoroughly understand the nature of love on another score, for he allows polygamy, while true and living love is a feeling that will not brook it. Aristotle, on the other hand, had a true conception of love, calling matrimony the union exclusive, lasting, and divine, which results from the interpenetration of the two opposite characters of man and woman. Such a conception was common to the minds of the Roman jurisconsults, who defined matrimony as *conjunctio maris et foeminae, consortium omnis vitae, divini et humani juris communicatio,* and as *conjunctio viri et mulieris individuam vitae consuetudinen continuens.* Hegel is right when he says that Kant presents matrimony in its shamelessness, in his definition of it as a bond of persons of different sex for the interchange and constant possession of mere sexual pleasures."[6]

[5]Ibid. p. 3.
[6]*Miraglia,* "Comparative Legal Philosophy" (Boston, 1912), p. 668.

In other words, marriage is founded on love, "an enduring sentiment—a constant will." Further, it is a complete personal union of the physical, mental, and spiritual phases of personality.

"The spirtual element should respond to the spiritual, the physical to the physical, so that the man and the woman are bound together by a three-stranded rope of soul, mind, and body. In the sentence, *erunt tuo in carne una,* the first phrase, *erunt tuo,* expresses this individuality and the impossibility of the fusion of two personalities; the other, "in carne una," expresses the unity of life. And now it must be remembered that the union of the sexes is a vital, not a mere physical union, though in the physical act the two fundamental sentiments of the individuals seem to become one."[7]

From this we can see that a true, ideal marriage is a life-long contract based on a life-long love, resulting in a complete union of two personalities in their triplex quality. We can see also from this that in fact there is no real marriage when these qualities are not present, and that a marriage is non-existent in fact when any one of these elements is lacking. Law has nothing to do with it. It can refuse to recognize its non-existence or cessation, but this does not make the so-called marriage a true and actual fact. The most it can do is to refuse recognition of the catastrophe on grounds of public policy or morality. Before going into the question of the adequacy or legitimacy of the grounds for such legal action, we must absolutely recognize it as without effect on the world of fact. Law cannot make a status, it can only entail upon certain acts, *parol,* written or *defacto,* the consequences of which, the status, if existing in fact, bring about. To quote Miraglia again:

"The truth is that, when divorce makes its appearance, the real union has ceased. It is not the violent destruction of marriage, but the legal end of a union, which no longer exists in fact."[8]

To understand this distinction and to comprehend fully that divorce is only the legal recognition of a fact is essential to a complete comprehension of the problem that confronts us. We must look upon it not as the destruction of a fact, but as its recognition. This is the first step towards a true understanding of the status of matrimony. And, without a true understanding of the object under examination no examination can lead to an increase of knowledge.

The second step towards a true understanding of the problem of divorce is to recognize it, not as a good *per se,* but as a remedy for an unavoidable evil. This is, of course, a corollary to our proposition, that divorce is a recognition of an unfortunate falling short of the ideal. It follows so closely upon the proposition itself that we need hardly discuss it. If marriage should be a life-long triplex union of two personalities, and divorce is a legal recognition of the actual non-

[7]Miraglia, Ibid. p. 669.
[8]Ibid., p. 701.

existence or cessation of such a union, on grounds of public policy, it follows that divorce is a remedy to avoid as many as possible of the evil consequences of a disordered state. It cannot be upheld logically or rationally as a good *per se*. And yet it has been so held by advocates of no mean ability. These advocates have been the members of the socialist fraternity, who have been led into anarchistic destructivism through observation of the existing evils of property. Since women once were little better than chattels, these enthusiasts advocate divorce as a step towards free marriage, which they endorse as the destruction of one kind of individual ownership. Their error is here apparent, the present status of married women is far from that of a slave and monogamy is not a form of private property, but a rational and ethical form of co-operation and associaton.

With our question thus stated, we can now consider divorce as one of the regulations and provisions which will make for the full development of the contractors of marriage, individually and as a family, in which latter relation the children are considered, with due regard to the well being and development of the society, of which they form a part. We will consider divorce as a regulation that *tends to remedy as many as possible of the evil consequences of an unperfected marriage.* It is only thus that divorce can be given a rational basis. But, the question thus put is complicated by many incidents. Marriage is ideally indissoluble; of this, there is no doubt. But, human frailty is such that at the present day and in the present state of development, this ideal is not generally possible of attainment. Human evolution, however, is constantly tending that way. Taking the question of the advisability of divorce from an internal point of view, so to speak, our first problem is: does divorce, the legal recognition of the non-existence of the union, make for or against the attainment of the ideal? The answer to this question is too often made from prejudce and not from reason. The question is not one that can admit of a universal answer, each race or nation reacting differently. But, the best opinion seems to be that a well-ordered divorce law is not a hindrance to development. The fact that immorality has increased and national life degenerated, where divorce has been free is not in point. The causal order is reversed in such a statement. It has been the luxury and extravagance of looseness of morals that has warped national life and resulted in the enactment of divorce laws which have not been remedial; laws, that is, that have not formed the legal recognition of the actual non-existence of marriage, but have, on the other hand, reflected the popular acceptance of concubinage and the absence of a juridical sense of mar-

riage. It is immorality which makes divorce a harbinger of immorality within the family, a means to license, an incentive to the prostitution of marriage; and not divorce *per se* that leads to such evils. Of course, when immorality exists, divorce, preverted from its remedial quality, is a *defacto* means for the realization of immoral ends. As Miraglia writes:

"The morality of a nation depends on many causes among which must be placed divorce and separation. But in combination with many different causes it is impossible to determine what influence each factor bears to the resultant state of morality."[9]

Yet is safe to say that divorce was never the initial cause.

"All these evils will develop, threatening to undermine the family and society, if divorce comes to be looked upon as a new form of freedom, which can be availed of as any other. A people which has such a conception of divorce is in a state of moral decadence, no longer understanding the worth of marriage or of ethical relationships. With them divorce will aid the work of corruption, and hasten their ruin. The Romans were corrupt when they began to avail themselves of the rights of repudiation and divorce as means for the attainment of their individual wishes falling into the excesses of which history tells us. In France, too, in the past century, morality was at a low ebb, and the law considered divorce as a result of the great principle of freedom. The Assembly allowed divorce upon the desire of either husband or wife, for incompatibility of temper. The Convention gave more rein, abolishing the prohibition of remarriage within a year after the declaration of divorce by mutual consent, and allowed divorce for six months desertion. Matrimony was, therefore, a status to be proved, as it is among the savage tribes; the Convention itself was forced to repeal its decrees which had produced infinite scandals. But if divorce is not a new form of freedom, but rather an enforcement of conjugal duties, social morality, far from being lessened, may be strengthened by it. The fear of divorce in uncorrupted ages, with people of deep rooted customs will insure the fulfillment of conjugal duties, and make divorce a remedy of little frequency. It has been shown that divorce can co-exist with good morals and not affect them: take the example of ancient Rome for hundreds of years. It was allowed in England for many years, and was rare."

We may, therefore, assert that divorce *per se*, as a remedy, does not tend to retard the attainment of the ideal. As far as *internal* reasons go, we may uphold divorce.

We must now take up the reasons, contra-distinguished from the causes of divorce. The first of these is, that it is not ethical to enforce as a contractual duty the heroism needed to keep up the appearances of married life, when respect has been destroyed by the total disregard of all marital duties upon the part of the other contractor. As Miraglia says many crimes are the result of this stand upon the part of legislators. It is not wise nor just to put a heavier weight upon persons than they can bear. No ethical or social good is effected by forcing men to crimes in an effort to realize an ideal beyond their power of attainment.

"If divorce were not possible, the evil would be great. It would be a cause of concubinage, and of the increase in the number of illegitimate births. Sometimes, too, the nominal bond which remains increases the dishonor of the

[9]Miraglia, Ibid. p. 705.

innocent party, since it imposes upon him, if rich, a duty of paying with a brave mien for the continual and irremedial infidelity of the other. The prosecution for adultery allowed by law is of no useful service, since no one cares to become ridiculous by a lawsuit, to enforce a possible imprisonment of a few months to a year. Cases are not lacking, too, when murder has been the result; and not rare are the acquittals upon the plea of the unwritten law. In other cases, suicide brings an end to suffering which the victim cannot bear. When the system of separation prevails, the children find their parents living in illicit unions, a fact which endangers the respect which they should bear towards the authors of their days."[11]

This is no exaggeration. On the score of the general balance of criminality, therefore, divorce seems to be advisable. And we can again cast our vote with the "ayes."

Thus, divorce from a positive point of view seems to be allowable as a remedy, because it tends to lessen the number of crimes in general, and because it does not hinder man's development towards the ideal of perfect marriage.

Let us now consider the negative point of view; that is, give due weight to the evils of divorce, and consider means of lessening them if they do not turn the scale in favor of non-divorce.

That divorce has evils in a fact too often seen to need a word of comment. We may say, however, that it need not be so black as it is painted. In the first place, we must again refer our reader to our main proposition; divorce is only the legal recognition of an actual evil. It should not be blamed, therefore, for the evils resulting from the fact of which it is only the recognition, but only for the evils resultant upon such recognition. These evils must be weighed with those resultant upon non-recognition, and the balance noted.

These evils in regard to the parties themselves, but not from their standpoint are given by Miraglia as three. In the event of a divorce,

"Society would be forced often to submit to the scandal of the marriage of the divorced and culpable party with the person who was the cause of his fault. For the statutes forbidding this are useless because of the legal uncertainty of the adultery. In the second place, it cannot be in accord with the sentiments of civilized nations that a woman who has been the wife of a man still alive should be the wife of another, or that a man should be the husband of two women, both of whom are still alive. In the third place, it is not an unfounded fear that divorce will be obtained for causes prepared, with malice prepense, by those who wish without cause to break the marital yoke. Acts of severe injustice, cruelty, and desertion will be committed with the secret intention of forcing a divorce. Cases will not be impossible where husbands will make opportunities for their wives' unfaithfulness in order to gain a divorce and remarriage."[12]

The first and third of these evils are to a large extent unavoidable, but with time and the cure-all of publicity, their occurrence may be lessened. And, it is a bad rule to inflict a known harm, as shown in our positive arguments, because of the possible abuse of the remedy.

[11]Miraglia, Ibid. p. 702.
[12]Ibid., p. 704.

The second is not in accord with the nicest feeling, but in America such marriages have been accepted without scandal. And, to go back to our main proposition again, divorce is not a good *per se,* but a remedy at best. A makeshift to cover an actual evil; the scandal of illicit relation; a scandal for which it is actually an effective substitute.

Thus, divorce from a negative standpoint, that is, with all its evils accepted as real and existent, seems to be allowable, as a remedy, because it substitutes such evils for others of greater weight.

Divorce, however, has a direct effect upon the children of the marriage or marriages, which cannot be neglected in the consideration of the question. The interests of the children of the first marriage, however, are largely analogous to those of the public at large. Although much more intimately and with a greater liability to harm because of their ages and of their receptive attitude, they are subject to the same evils. The evils of divorce and non-divorce bear in their regard the same proportion, though increased in weight, and the scale, therefore, falls on the same side. There is one point, however, wherein their position differs; in their dependence. This point we will consider from the economic point of view, as one of the complications of divorce. It must be remembered in justification of our statement that the children of the first marriage are in the position of the public at large, that we, in America, see only the evils of divorce, not the evils of non-divorce. In other words, the position of the children of divorced parents is constantly before us, and their position is compared with that of children whose parents continue to live together, or who are separated, and we conclude that divorce *per se* is bad. This comparison, however, is not fair, as a moment's reflection will show. The position of X, Y, and Z, the children of divorced parents, must be compared with the position they would occupy if their parents had not taken the *remedial step.* It is not fair to compare it with the position of A, B, and C, whose parents' estrangement was not complete, *ex hypothesi.* In order to get a clear view, we must keep in mind that the parents of the latter have not found their relation impossible, no matter how difficult it may be, and that divorce is a remedial recognition of the impossibility of the union, not a means for the shifting of a difficult burden, as thus only can it be upheld. The children of the second marriage are in a difficult position to consider. We can, of course, state without proof that their position is infinitely preferable to illegitimacy. Such a comparison is not possible. But, approximating such a problem, we can advance two arguments which make for the allowance of divorce. We may here say by way of

parenthesis that by divorce we mean the absolute rescission of the marriage bond, with full liberty to remarry, under certain definite restrictions as to time and person. The question of legal separation we will take up later. The two reasons which favor the freedom to remarry, with reference to the children of the second marriage, are: (1) the interests of the public in the procreation of legitimate children, and (2) the fact that children must be considered in two lights: the ultimate light of their own personalities, wherein we have waived argument, and in their medial relation to the happiness of their parents, whose philogenic instinct must be given weight. We must, therefore, conclude, from the weight of evidence attainable, that there is no such injustice to the children of the second marriage as to furnish grounds for the denial of divorce, and that the position of the children of the first is not made worse by the use of such a remedy.

We must now say a word in favor of divorce as a remedy with regard to the participants—for:

"It must not be forgotten that social interests, and conventions should not destroy an individual right, as the latter should not be raised above social rights. In this case, as in others like it, the two terms tend rationally to the harmony which comes from looking upon the state as an ethical organism. A state would be a single physical or natural organism, in which the part lives the life of the whole if it is absorbed in its eminent right, the rights of the individuals, which have their own personality, and realize the idea of man in one of his branches."[13]

So, Miraglia states the right of the individuals to have a recognition of their needs given them, proportioned to a recognition of the rights of society. Accepting the fundamental presupposition of philosophy, it follows that divorce from a personalistic standpoint is a remedial right due them. No legal obstacles be raised against such individuals because of preconceptions or prejudices on the part of the legislators, without due regard to the facts of the actual cessation or non-existence of the marriage relation; and without an eye to their needs, including the physical need of sexual relations, of support, and of the physical and mental comforts of home life, the need of companionship, respect, honor, and the needs of encouragement, trust, and confidence. When these have failed, it is injustice to deny the deceived and disillusioned party the opportunity to remedy his or her mistake by beginning life again. The claim of the injured person may be lessened by the rule *Male electio est in culpa,* but it is still a claim which is entitled to due consideration. It is something added to the *pro* side of the balance. And, when we consider the interest of society in having happy members, not subject to temptation to crime, the advantage of the remedy to the parties themselves is conclusion in favor of divorce.

We can, therefore, in solution of our problem, state that we con-

[13]Miraglia, Ibid. p. 702.

sider divorce as one of the regulations that makes for the full development of the contractors of marriage, individually and as a family, in which latter relation the children are considered; a regulation that tends to remedy as many as possible of the evil consequences of the actual cessation or non-existence of an alleged marriage; that lessens the tendency to crime, by doing away with the empty mask of a relation, and by giving freedom in place of slavery, with the consequent enlarging of the field for development both personal and social.

We may here take up the question of conditional divorces. They are unquestionably advisable to prevent the abuse of divorce as a means of license instead of as a remedy. They have a sound basis in that the logical rationality of divorce lies in its effective beneficial tendency to the ethical well being both of the parties and of the community. Then there is a right to circumscribe it with conditions to prevent not only its abuse but its use from unethical motives. The most common condition to prevent its being a reward of immorality is the prohibition of the marriage of the respondent and corespondent. Another condition of a purely precautionary nature is the prohibition of remarriage within a certain time. The object is to prevent an application for divorce, where longer consideration may show that the marriage has not ceased in fact, or for heterogeneous reasons, under the influence of an infatuation, which befogs the mind only temporarily. Conditions, based on eugenics and hygiene, might well be made in the case of remarriage in communities where the social sense is not sufficiently developed to allow them for marriage in general. The proof of disease is often given in divorce and the sense of shame cannot be outraged by a prohibition where the disgrace has already been held up to the public view. The right of the state to prohibit marriage on such grounds cannot be doubted; it is denied only by some jurists because its exercise necessitates an examination which they think invades the sphere of personal freedom. It would be well to remember that the sphere of personal freedom is not determined by its historical definition, but the logical determination of the proportion, giving the greatest personal freedom to both contesting parties, their children and the community; the greatest freedom for full self-realization without harm at the hands of one individual. Then it is well to recall in considering the enactment of precise marriage laws, that tend to legalize only those marriages, which, because they most closely approximate to the ideal, will be less likely to prove non-existent in fact, or to cease. But, to return to our particular point, this alleged violation of personal freedom can have no weight against the prohibition of re-

marriage on the grounds of disease, as has been argued, however irrationally, because the violation and exposure have been effected, and it is merely a question of acting upon evidence already in court.

Before passing to incidental questions and some of the complications of divorce, we must say a word about separation. To our mind separations are unjustifiable, as a substitute for divorce. They are not fish, flesh, nor good red-herring. They are a recognition of incompatibility but are without remedial force. They prevent, it is true, the wasting of the estate. By regulations of the financial relations, they enforce support, and they prevent personal abuse and violence. But, to argue that, for these reasons they are preferable to divorce, is merely to assert that non-divorce is preferable to divorce, and that as a sop to Cerebus, we will enfranchise woman so that coverture will be no defense to crime, tort or civil injury. Separation, from the personalistic standpoint, does not allow the full development of the parties to a non-existent marriage. It forces them to live in solitude, without the opportunities and comfortable solace of companionship and family. It is a protection, as we have said, from personal violence, abuse and peculation, but is no substitute for divorce. It is more analogous to the statutes against homicide, assault and battery, man-slaughter, embezzlement, and the laws governing guardians and trustees, than it is the law governing status. It, in fact, enforces the recognition of the so-called marriage—non-existent in fact *ex hypothesis*—and attempts to regulate it. This much for the individualistic standpoint, and this last sentence shows without more ado, that separation is equivalent to non-divorce in a social aspect.

The question of divorce, however, is complicated on many sides by ramifications resulting from the fact that the conjugal relation is the basis of the family or the social unit. One of these complications, which is absolutely extrinsic, is the jurisdiction of the church. This question is in its turn confused by the misunderstanding or misrepresentation of the problem. In other words, the question of jurisdiction is not kept distinct from that of justice or rightness of divorce. As the champions of the uniformity of law among the American states, are often, as we have said not champions of uniformity *per se*, but of their own notions, so a large number of champions of church control are affected by the fact that the churches are generally against divorce. For, as far as the Catholic church is concerned its attitude has been constantly against it.

"The church from the beginning endeavored to inculcate the principle of indissolubility as better conforming to Christian beliefs."[14]

[14]Miraglia, Ibid. p. 706.

But here we must restate our proposition briefly to make a further comparison clear. Divorce is right, but right only as a remedy. We must, therefore, bear in mind that it is not right to favor church control because civil marriages are dissoluble. This is making two logical and scientific errors. First, it is unscientific in granting jurisdiction to a science, regardless of its fitness or capacity to investigate and determine the question under consideration; because the answer will be given through prejudice and preconception. We do not say that the Church would so act, but we say that its attitude towards divorce is unwise for these reasons. Conversely, the deprivation of jurisdiction for the same reasons is equally unwise. In the second place, it is illogical to confuse divorce with the right of rescission of contract. If rescission is wrong in marriage, the marriage contract cannot hold unless denial of rescission applies by analogy to other contracts; this is fallacious. To take up the latter reason first, we will recapitulate. The juridical ideal is indissolubility, but divorce is a proper remedy for a marriage no longer in existence. This does not deny the ideal of indissolubility. In fact, divorce is allowed only upon proof that it does not tend to retard the attainment of the ideal, through historical and evolutional development. Any attempt, therefore, to show that law must allow rescission of marriage, through the supposed equivalency of divorce, the remedial recognition of the nonexistence of marriage and of the right of rescission, presupposes *ex hypothusi* the fact of marriage is insidious and founded on untruth. Rescission is immoral, unsocial and unethical. These facts govern and necessitate the legal denial of the right of rescission. The arguments in favor of it are bad. The analogies of marriage to contract, involving the right to rescind, and of indissoluble marriage to slavery involving an ideal of indissolubility, are not well founded. Miraglia takes up these points in the following passage, where we may add by way of introduction and explanation, he uses the vexed term "natural law" to designate the ideal goal of positive law.

"From the legal and civil point of view the orthodox doctrine can be followed that consent is necessary for the creation of the contract, but not for its preservation. It can easily be held that consent is a necessary prerequisite of marriage, which, however, must conform to natural laws and be absolute and irrevocable. In this respect the subjective element should be subordinate to the objective. So in contract law, it is not always true that the contractural acts depend upon consent. The jurists say, *Quae ab initio sunt voluntatis, post factum sunt necessitatis,* if society or third parties have an interest in the contract. Civil marriage is not based on the principle of arbitrary and individualistic ethics. It is a result of the conception of a lay state, and of liberty of conscience. In other words, logic does not prevent the civil marriage, and repudiates the theory of Grotius, Puffendorf, and Thomasius. For Grotius, in his definition of marriage laid emphasis on the physical side, practically allowing for no difference between it and concubinage. The difference, he says, is one of positive law: *Concubinatium*

quemdam verum ac ratum esse conjugium etsi effectibus quibusdam juris civilis propiis privaten aut etiam effectus quosdam naturales impedimento legis civilis, amittat. Puffendorf believed that matrimony, being consensual in origin, was subject to all the laws of contract. Thomasius believed that indissolubility, conjugal fidelity, and marital authority are all parts of the conjugal contract, and no consequents of the natural law. This ideal of indissolubility should not be disregarded on the ground that law does not recognize contracts which result in the abnegation of civil personality, for marriage is not a mutual renunciation, but, on the other hand, it is the acquisition of a new status. Even if a husband and wife make their two natures one, as Rosmini says, yet it is impossible for them to become one and to preserve distinct and inalienable individuality. In fact law protects their distinct personalities. The law does not recognize irrevocable contracts, implying a full or partial alienation of personality, but recognizes those which, without producing such alienation, create a higher order of ethical relations."[15]

The question of jurisdiction also should be entirely free and distinct, and in every way untrammelled by the real question of divorce. The object of or desire for jurisdiction may lie in the question of divorce, but we should recognize that the decision on the question of jurisdiction should not be affected by the probabilities of the different decisions of the two courts—church and state. When this question is thrown overboard,, we can approach that of jurisdiction philosophically. There is but one answer. The state must have jurisdiction in marriage and divorce, because of the political, social, moral, juristic and ethical quality of the relation. The strength of the state's position lies in the fact that it is not opposed to the super-imposition by the Church of whatever further injunction it may seem advisable in the religious sphere. It merely demands the right to impose conditions within the spheres for which it is responsible, and it is primarily responsible for the political, social, moral, and legal, and ethical well-being of its citizens or subjects. To quote Miraglia:

"Marriage is an ethical, religious, and legal institution. The church considered the sacrament as the essence of a conjugal union, and therefore claimed the right to regulate it with its canons and in its courts. The state is not an atheistic but a lay power. It has no authority in religious matters, and therefore cannot look upon marriage except as a civil contract, *sui generis,* recognizing, however, that the complete union is a divine bond. The incompetence of the state is not due to ignorance of religion or the church, nor indifference to those high human interests so vital and powerful. In the state there is contained and developed the same human nature on which religion is based; but the state considers human nature only from the juristic point of view. It should prevent the clergy inspiring the multitude to rebellion or fanaticism, but at the same time, it should not encourage the development of atheism. To look upon marriage as a civil contract does not mean to lower it to the condition of a bargain and sale, partnership or ordinary contract, in which there is great usefulness, or an exchange of value, but it connotes the recognition of the perfect union of two persons of different sex. Marriage, looked upon as a civil contract, has a distinct and particular nature in its meaning and its end, and is essentially different from all other contracts. The state, in the case of marriages, not only exercises its functions of guaranty, but intervenes as an ethical power, an organ of natural law, and realizes the conception of matrimony, determines its conditions, taking account of the various his-

[15]Ibid., pp. 697-699.

torical needs of the people. Consequently it cannot, as Trendelenburg would wish, give over without abdication to the church the contract of marriages."[16]

Thus the right of the state to grant divorce is assured, while the right of the Church to deny divorce within the religious sphere remains intact. In other words, divorce may even as a remedy be wrong generally, which, of course, would be philosophically wrong, but in this article we have used the word "philosophy" to cover all the sciences save religion. It remains politically, socially, morally, juridically and ethically right, and therefore, should be allowed by the state. As a practical question the state must keep account of matrimonial statistics, because of franchise and succession.

A word in passing may be said on a subject closely connected with that of divorce—impediments to marriage. The true determination of these is one of the most important factors, in the question of matrimonial law. For, when accurately determined with an eye to circumstances and conditions, they make for the attainment of ideal marriages, and when lax or unjustifiably stringent they bring about the status whose legal recognition is divorce. The impediments generally recognized in America are minority, physical incapacity, mental incapacity, prior marriage and consanguinity. These are, of course, impediments in fact, and make an alleged marriage void. The proceedings for annulment are not so much to effect a change of status as to record the old existing status. Their number can well be increased, for example, today a movement is on foot requiring a clean bill of health. This is a good move, and with the increase of knowledge and social sense in the community, we can prophecy its early realization. On the Continent, many impediments are recognized, which perhaps have outlived their usefulness, but, as so much of the canon law, they show a good tendency to reflect juristically the efforts of the people to avail themselves of juridical or any kind of scientific knowledge. Thus, the betrothal, as a semi-juridical custom, entailing many duties of an intimate nature, is a continental custom which makes for the avoidance of many ill-timed unions. It might well be legally enacted by requiring an interval between the issuance of the license and the consummation of the marriage. Thus, a period of trial would be effected, which would have as many as are practical of the advantages of the trial marriage and would lessen the number of unions recognized by the state, in which one or more elements of marriage, the triplex union of the physical, mental and spiritual phases are lacking, and, hence, lessen the number of recognitions of the actual non-existence of marriage, that is, of divorces. A moment's

[16]Ibid., pp. 674, 676.

reflection will show that this precaution will have a more salutary effect than the refusal on the part of the state to recognize the mistake when made, because it will show the error before the more serious relation is entered.

Another question related to the question of divorce is that of the right of ownership of property. There are several theories ranging from the old theory, whereby the husband upon marriage became the sole owner of everything, to the American theory, whereby both husband and wife retain and administer their own property. The intermediate theory of note does not affect the property, but gives the husband the right to administer, with an appeal to the courts by the wife in case of his abuse of it. We can see that all these methods have elements of destructive principles. But, the American system, entailing the greater freedom is undeniably the best and we can but say that the status of marriage should not be burdened with an arbitrary rule as to the property, which should be left to the determination of the individuals with the hope that their union may be sufficiently true to tide them over this difficulty.

Another complex problem of divorce is the economic and financial question. By this we do not mean that its present cost in America is too large for the poor. This is a fact beyond dispute, which leads, among our lower classes, especially among the negroes, to the evils of a non-divorce regime, and subjects their morals to the adverse criticism of sociologists. But we mean that divorce is an economic dilemma, for which we can find no solution. In other words, what can be done in the case where the husband is unable to meet the increased financial drag of two establishments. This question is one of the most general application. It is neither restricted to the very poor, nor to the case where he immediately remarries, nor is it solved by the abolition of alimony (as in Pennsylvania in most cases), for he must support his children. This question applies to the large number of men in moderate circumstances, who can support a family, all members of which live under one roof, but who cannot adequately support themselves and their wife and children living in two establishments. To allow a man, because he has made a mistake, however real and serious, to throw the burden of it upon others is unjust and unethical, as may be seen at a glance. Divorce, nor marriage itself, for that matter, should be permitted to those who cannot bear its burdens. And yet to make divorce depend upon proof of such ability is followed by two great evils, one direct and one indirect. The direct evil lies in the inequality created before the law. While this may have more

appearance than substance of injustice, yet it is not a situation to be sought because it is a motive to social unrest, and because it is prohibitive of the remedy of divorce to many, thus placing them in an actual non-divorce granting regime; in the midst of one, whose juridical institutions allow divorce. The inevitable result of this is misunderstanding and a division of society which should be homogeneous into two camps in regard to a political, social, moral, juridical, and ethical fact. In the second place, it is indirectly bad, because it puts the state in the position of a guarantor of this ability—if proof of this ability is a prerequisite of divorce. This has a bad effect, resulting in one of two possibilities. If a proof of ability, a bond or the creation of a trust is required, the direct evil of this system is multiplied by the increased number of men living on salary or as *cestui que trustents,* unable to furnish a large sum or obtain bonds. If a proof of income at the date of divorce is sufficient, and attachment or sequestration are relied upon to force his payment of support, the number of cases where payment will be neglected through fraud or concealment of assets will put the state's "proof" to ridicule. It would seem that there were no way to escape the trouble. Yet, we can only look upon it as a complication of the divorce problem. As a negative argument it is vain, for the answer is simple; the family is no better off in the circumstances without divorce, for the man may easily spend his money otherwise than in support of his wife and children. We can hope only that evolution of the social sense, accompanied by the great panacea of publicity will enable the philosophical students of law to reach a conclusion on this matter, which will result in the disappearance of the dilemma from the field of unsolved problems.

In conclusion we may hope that the philosophical dream of marriage may some day be attained, for in this matter, as in every other, the philosopher has a theory and an ideal. He believes that men will grow in time to take the relation with such true sense of its political, social, moral, juridical and ethical importance that the recognition of the cessation or non-existence of marriage may be left to the parties themselves, who with certain formalities can divorce themselves, without the scandal of an action at law.

"Should divorce be allowed upon mutual consent? Montesquieu says that the law establishes causes for divorce where incompatability is the clearest denial of the absolute union of matrimony. In this case, mutual consent is not the cause of the dissolution of the marriage, but is only the sign. It cannot be alleged that the allowing such a cause of divorce is reducing marriage to a contract. It would serve to hide the woes and shame of the home, it would avoid ridicule, and prevent the necessity of a legal accusation, which sometimes results in imprisonment. But to ward off a series of abuses fatal to matrimony, the law should surround it with the greatest precautions."[18]

[18]Miraglia, Ibid., p. 710.

But until the ideal is realized we heartily commend a study of the underlying causes of matrimonial shipwreck so that divorce may remedy its ills, without hindering progress, and so that it may meet the demands of social life.